



STATE OF WISCONSIN – JUDICIAL COUNCIL

AGENDA

WISCONSIN JUDICIAL COUNCIL

OCTOBER 21, 2022 – 9:30 A.M.

WISCONSIN STATE CAPITOL

ROOM 328NW

MADISON, WISCONSIN

**Members wishing to call in should call
(339) 209-6255 at 9:30 a.m. on 10/21/22. There is no Access Code.**

- I. Roll Call and approval of the Minutes for September 16, 2022 Meeting.
- II. *Discussion of a new approach to Council Meetings proposed by Chair Gleisner.* Since the Council lost its funding, every month the full Council meets involves a discussion of matters of general interest as well as action on the business concluded by the Council's Committees. However, for as long as the Council continues without funding, Gleisner submits that the Council is missing an opportunity to serve as a committee as a whole and, in that capacity, address issues of importance without referral of same to a standing committee. The Council's standing committees have a number of pending projects. When the full Council meets, why not make full use of the Council's time and address a special project which the full Council can address over one or more full Council meetings? As long as the Council continues without funding, this will ensure that the full resources of the Council are being put to work for the benefit of the Bench and Bar.
- III. *A suggested special project for consideration by the full Council acting as a Committee of the Whole beginning with the October Meeting.* Back in early 2018, Tom Shriner pointed out a serious flaw in our service of process rules as they relate to litigation against foreign defendants. I will illustrate one aspect of the problem by relating a personal experience.

I was asked to help a plaintiff's counsel secure service of a summons and complaint on a German company. The plaintiff's counsel had started a state action four days before the statute of limitations (SOL) ran on a Wisconsin claim. The plaintiff's lawyer assumed that by starting the action before the SOL had run, the SOL was tolled and he thus had plenty of time to perfect service in Germany. That is not the case given the way our rules of civil

procedure now read. Wis. Stat. §801.02(1) does provide that a civil action is commenced as to any defendant when a summons and complaint are filed with the court, providing service is made upon the defendant within 90 days of filing. But Wis. Stat. §801.15(2) states “The 90 day period under §801.02 may not be enlarged.” *See also* Wis. Stat. §893.02. Worse, since this case involved an action against a sophisticated corporate defendant in Germany, service by mail was not a viable option because Wis. Stat. §801.11 does not provide for service by mail and substituted service under §801.11 was of very doubtful benefit. In fact, there is no reference to cases involving international service in our Rules. I hired two international process servers who promised to complete the service by different means, and we did accomplish timely service. The Plaintiff then survived a Motion to Dismiss for lack of personal jurisdiction. However, it was unnecessarily difficult, and very expensive.

Based on *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017) (decision accompanies this agenda), Tom Shriner wrote an excellent Blog in Foley & Lardner’s Wisconsin Appellate Law discussing the foregoing problem (that blog also accompanies this Agenda). That Blog states as follows:

[The unanimous *Water Splash*] decision... points out a glaring omission in Wisconsin’s service-of-process rules that ought to be fixed, so that Wisconsin plaintiffs are not unnecessarily put at a disadvantage when suing overseas defendants in state court. Justice Alito’s decision [in *Water Splash*]... held that Article 10(a) of the [Hague Service Convention]... authorizes service of process, including summons, by mail in any country that is party to the Hague Service Convention and does not object to mail service. Canada, where respondent Tara Menon lives, does not object, so the Supreme Court upheld the judgment against... Menon.

Wisconsin’s state law clearly precludes service by mail in this situation... The problem is especially excruciating for Wisconsin plaintiffs because service in state court has to be accomplished within 90 days of the filing of the summons and complaint [and] ... §801.15(2)(a) expressly forbids a court to enlarge the 90-day period for service. And, to make matters worse, the statute of limitations is not tolled by filing of the action unless service of authenticated copies of the summons and complaint is made within 90 days...

Tom Shriner did endeavor to raise the problem he identified in his Blog. See the Council’s October 19, 2018 Agenda. However, the Council lost its funding shortly thereafter. Chair Gleisner submits that this is precisely the type of very specific issue which the Council can take up as a committee of the whole and in short order make a recommendation to the Supreme Court (or the Legislature) to improve the position of plaintiffs (including defense cross-claimants) in Wisconsin. The Council’s Evidence and Civil

Procedure Committee could not address this issue because it lacks both funding and staff.

IV. Reports by the Chairs of each Council Committee:

- A. Ms. Margo Kirchner, Chair of the ad hoc Committee on the “Council Corner” (a monthly report to the State Bar on the work of the Council) will report on work performed to date.
- B. Mr. Thomas Shriner, Chair of the Council’s Standing Committee on Evidence and Civil Procedure, will identify the members of his committee and report on the following:
 - 1. Work completed to date on revisions of Wisconsin’s rules concerning injunctions.
 - 2. Work on his committee’s ongoing work on revisions to Wisconsin’s Rules of Evidence.
- C. Judge Thomas Hruz, Chair of the Council’s Standing Committee on Appellate Procedure, will report on the work completed by his committee to date.
- D. Judge Robert VanDeHey, Chair of the Council’s standing Committee on Criminal Procedure, report on the work completed by his committee to date.

V. Adjournment.

PUBLIC NOTICE

All meetings of the Judicial Council and its committees are open to the public. The Council’s October 21, 2022 meeting will only take place in person in Room 328NW of the Capitol Building. There will be no Zoom access to this meeting. Subject to limits imposed by the size of Room 328NW, members of the public are welcome. However, if any member of the public disrupts the meeting in any way, security will be called, and the disrupting member will be asked to leave. For more information, please contact the Chair of the Judicial Council, Mr. Gleisner, at 414-651-3182 or gleisnerwilliam@gmail.com.